United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

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76-2065

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR GATES,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Docket No. 76-2065

BRIEF FOR PETITIONER-APPELLANT ON REHEARING EN BANC

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING A PETITION FOR HABEAS CORPUS.

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ISSUES PRESENTED

Whether the District Court erred in "understanding" the state court opinions as holding appellant's objection to be insufficiently specific, because the record shows that those state courts mistakenly found that appellant had never made any objection at all. Also, whether, since the record conclusively demonstrates that appellant did object, and with sufficient specificity, and that appellant did not deliberately bypass state procedures, the state courts mistakenly deprived him of an opportunity for full and fair litigation of his fruit-of-unlawful-arrest claim.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Carter, D.J.), rendered May 27, 1976, dismissing, without a hearing, appellant's petition for a writ of habeas corpus.

Timely notice of appeal was filed and the District Court, on June 17, 1976, granted appellant a Certificate of Probable Cause and permitted appellant to prosecute this appeal in forma pauperis.

On July 6, 1976, this Court appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

This appeal was originally argued on October 19, 1976, before a panel of this Court (Smith, Oakes and Timbers, JJ.), and on January 12, 1977, that panel, with one judge dissenting, reversed the judgment of the District Court and remanded the case for a hearing on the merits of appellant's claim. Gates v. Henderson, ___ F.2d ___ (2d Cir. January 12, 1977), slip op. 1345.

The panel held that:

> ...appellant did not commit the sort of procedural default that would bar him from asserting a federal claim in this collateral proceeding. It follows under Townsend v. Sain, supra, that the

> state courts' failure to develop evidence crucial to appellant's claim deprived him of a state opportunity fully and fairly to litigate it. Because such an opportunity is a critical pre-condition to the application of Stone v. Powell, supra, that case does not operate here to prevent the district court from reaching the merits of appellant's Fourth Amendment claim. Our analysis above also indicates that the district court erred in holding that New York procedural requirements barred federal consideration of appellant's claim on a petition for habeas corpus.
>
> Gates, supra, slip op. at 1360

On January 25, 1977, the state petitioned for rehearing with a suggestion for rehearing en banc, and on March 7, 1977, this Court voted to grant reconsideration en banc.

B. Statement of Facts

Appellant Arthur Richard Gates was convicted in County Court, Rockland County, New York, on February 14, 1967, after trial by jury, of the crime of murder in the first degree and sentenced to a term of 20-years-to-life imprisonment (Silberman, J., at trial and sentence). Appellant is presently confined in the custody of respondent-appellee pursuant to that judgment.

Appellant, in his pro se petition to the District Court, sought a writ of habeas corpus on the ground that his conviction was constitutionally defective in that it was secured after introduction of evidence, to wit, palmprints, which were taken from him without probable cause in violation of his Fourth and Fourteenth Amendment rights and contrary to the Supreme Court's decisions in Davis v. Mississippi, 394 U.S.

721 (1969), and Mapp v. Ohio, 367 U.S. 643 (1961).

1) The State Court Proceedings

Appellant's trial, which lasted eight days, involved a prosecution case built exclusively on the basis of circumstantial evidence. See opinion of the New York State Court of Appeals, People v. Gates, 24 N.Y. 2d 666, 669 (1969) (Fuld, C.J.). Included in the state's proof was palmprint evidence which the prosecution claimed tended to connect appellant with the crime. Even with the introduction of this palmprint evidence, which was admitted over defense objection, the jury deliberated for more than fifteen hours, over the course of two days, before reaching a verdict.

* * *

At approximately 1:00a.m. on the morning of September 7, 1966, Audrey Mierop, a tenant in a second floor apartment in Spring Valley, New York, heard unusual noises coming from the downstairs apartment, which was occupied by Patricia Gates, appellant's estranged wife. Mrs. Mierop hollered for help and ran downstairs where she met Patrolman John Sullivan, who had entered the building to investigate.

The officer forced open the door to Mrs. Gates' apartment and found her in her bed, bleeding and in a conscious state.

At trial, Mrs. Mierop testified:

> I walked in and as I saw her, I said, "Oh, my God, Pat." She says, "Audrey, call my mother and my

> brother." I said, "Pat, who did this?" She didn't answer. I said, "Pat did Rich [Petitioner] do this?" She said, "I don't know but he wore glasses."
>
> (T. 118)*

Mrs. Gates then lost consciousness. She was removed to the hospital, where she was pronounced dead at 1:20a.m.

Mrs. Gates' statements to Audrey Mierop, prior to losing consciousness, clearly indicate that Mrs. Gates was lucid enough to recognize her neighbor and discern that her assailant was male and wore glasses. Notwithstanding such lucidity, Mrs. Gates did not recognize appellant as her assailant, even though appellant was her estranged husband and even though she had been directly asked whether or not appellant was her attacker.

Appellant was arrested at 1:45a.m., only 45 minutes after the attack, by Patrolman Fred Meyers, of the Spring Valley Police, after being stopped by Meyers ten miles from the scene of the stabbing, for failure to dim his headlights (T. 941). At the time appellant was stopped, he made no attempt to flee (T. 960, 960a), did not act suspiciously (T. 961), was able to produce proper identification (T. 942, 961), and his appearance was normal. As the panel decision observed, the headlight traffic infraction was "an offense entirely unconnected with the stabbing." Gates, supra, slip op. at 1346.

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* "T" refers to minutes of trial, January 13, 16, 17, 18. 19. 20, 23, and 24, 1967.

Nevertheless,

> [f]or reasons that are obscure, the officer who stopped appellant, after taking his driver's license and registration, arrested him in connection with the stabbing.
>
> (Id.)*

---

* Appellant had minor cuts in his right hand, but these were not noticed by the arresting officer until much later, when they arrived at the police station. (T. 961).

At trial, on direct examination, Meyers first testified that he noticed appellant's hand at the time he pulled him over for failing to dim his lights, and saw what appeared to be cuts on appellant's hand (T. 944, 945).

However, on cross-examination, Meyers admitted that he did not, in fact, notice appellant's hands until they reached the police station:

> Q. Was it at this time, sir that you say you noticed his right hand?
>
> A. No, sir. I noticed his hand in the station.
>
> Q. In other words, you didn't notice his hand at the place where you stopped him?
>
> A. No, sir.
>
> (T. 961)

Appellant was brought to the station house in the Village of Spring Valley, and an hour and a half later he was taken to the police station in Clarkstown. At sometime between the hours of 4:00 and 5:00a.m., appellant was subjected to fingerprinting and palmprinting by the Clarkstown police.

Meanwhile, the police at the scene of the assault had already found two latent palmprints on the window through which Mrs. Gates' assailant had apparently entered (T. 419-420).

The trial record is devoid of any explanation as to the probable cause for appellant's arrest and subsequent palmprinting.

At trial, outside the presence of the jury, appellant's counsel objected to the introduction of those palmprints of his, taken by the Clarkstown police:

> (In Chambers)
>
> THE COURT: Mr. Newman, you inform me that you want to make an objection outside the presence of the jury.
>
> MR. NEWMAN: Right. As I understand it, the District Attorney is about to introduce into evidence fingerprints which were taken by the present witness, Captain Eisgrau of the Clarkstown Police Department.
>
> MR. MEEHAN: (D.A.): Did you say fingerprints?
>
> MR. NEWMAN: Hand prints, and which were taken at the Clarkstown Police Department on the morning of September 7, 1966. While there is no question, and we will stipulate, that they were taken of the defendent in this case, we raise objection not to the fact that they are or not his prints but to the introduction of those prints on the basis that this man's constitutional rights

both under the State and Federal constitution have been violated by the taking of these prints and as such we object to them.

THE COURT: Your objection is then on constitutional grounds to the mere fact of the taking of the prints?

MR. NEWMAN: Yes, sir.

THE COURT: As such?

MR. NEWMAN: Right, sir.

THE COURT: I will overrule that objection.

MR. NEWMAN: Exception.

MR. MEEHAN: Your Honor---

THE COURT: And you will have a similar objection, without having to renew it, for the record to any further introduction of prints taken of the defendant by any other law enforcement officer.

MR. NEWMAN: Fine, sir.

THE COURT: And with the same ruling.

(T. 535-536, emphasis added)*

Although counsel's objection was not made with the greatest degree of clarity or elegance, it should be quite obvious that he was talking about the Fourth Amendment: (1) He objected to "the taking of these prints," and a "taking" is virtually synonymous with a "seizure" and thus clearly a reference to the Fourth Amendment. (2) He could not very well have been making a Fifth Amendment objection, for the Supreme

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* Defense counsel also later objected, in open court, to an officer's description of appellant's hand in the police station at the time of the fingerprinting and palmprinting. Here, too, the objection was on "constitutional grounds both state and federal" (T. 548-549).

Court had already held six months prior to the objection herein that compelling blood tests or fingerprinting does not violate the Fifth Amendment. Schmerber v. California, 384 U.S. 757, 764 (1966).

Although it is clear that an objection specifically citing Davis v. Mississippi, 394 U.S. 721 (1969) [fingerprints taken without probable cause violates Fourth Amendment], would have made it much more obvious that appellant was relying on the Fourth Amendment, at the time appellant's objection was made, there was not yet the specific Davis case to cite. In any event, the trial court, in overruling appellant's objection, apparently understood that it was on Fourth Amendment "taking" grounds, because the court sought to clarify that very point before ruling:

> THE COURT: Your objection is then on constitutional grounds to the mere fact of the taking of the prints?
>
> MR. NEWMAN: Yes, sir.
>
> (emphasis added)

Thus, neither counsel nor the court ever spoke in terms of anything like "self-incrimination," which, of course, would have implied Fifth Amendment, but rather always spoke in terms of "taking" which implied a Fourth Amendment violation.*

Appellant's conviction was affirmed without opinion

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* Nor did the court, in overruling the objection, say or suggest in any way that the objection was untimely.

by the Appellate Division of the Supreme Court of the State of New York, Second Department, People v. Gates, 29 A.D. 2d 843 (2d Dept. 1968).

Appellant then appealed to the New York Court of Appeals, again asserting that the palmprint evidence had been obtained in violation of the Fourth Amendment.* The State's brief responded to that same issue with a Fifth Amendment analysis.**

On April 22, 1969, while appellant's appeal before the New York Court of Appeals was still sub judice, the Supreme Court handed down its taking-of-fingerprints decision in Davis v.

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* The case was argued before the New York Court of Appeals on February 27, 1969, and appellant's brief argued the following point:

> II. The arrest of defendant was without probable cause and evidence obtained as a result of that arrest was improperly admitted in evidence.
>
> People v. Gates, 24 N.Y. 2d at 666

** II. Use of certain physical characteristics of appellant in evidence was proper. (... Schmerber v. California ... .)

24 N.Y. 2d at 667 (other citations omitted).

Schmerber, as already noted, is a Fifth Amendment case, and the State's point heading makes no mention of probable cause, "taking," seizure or the Fourth Amendment.

Nor, significantly, did the State's points in the New York Court of Appeals raise any claim of untimeliness.

Mississippi, supra.

Twenty-two days later, on May 14, 1969, the Court of Appeals rendered its decision, affirming appellant's conviction. People v. Gates, 24 N.Y. 2d 666 (1969). The Court of Appeals acknowledged that:

> In the light of the Supreme Court's recent decision in Davis v. Mississippi (394 U.S. 721), there can be no doubt that fingerprint evidence is "subject to the proscriptions of the Fourth and Fourteenth Amendments" and that such evidence is to be excluded if it be the product of an illegal arrest (394 U.S. at p. 723).
>
> Gates, supra, 24 N.Y. 2d at 670.

Despite this acknowledgement that the taking of fingerprints is covered by the Fourth Amendment, the Court of Appeals stated that in appellant's case "the question is not preserved for our review upon appeal from the conviction" because of what that court termed appellant's "failure to object to the use of the evidence on that ground, or even to intimate that such an issue was in the case" (id.) Citing the absence of a full development of the facts as to probable cause, the Court held that it could not decide the question "on the basis of the record now before us" (id.) At the same time, the Court specifically did not preclude appellant from seeking "a postconviction hearing to determine the factual circumstances attending his apprehension (id., at n.6).

As the panel of this Court correctly noted in its opinion (slip op. at 1350), the New York Court of Appeals'

opinion in appellant's case "does not in any way allude" to appellant's above-quoted objection, at trial, on Constitutional grounds, to the "taking" of his prints (T. 535-536).

Appellant then returned to the original trial court and sought, by applying for a writ of error coram nobis, to obtain a postconviction hearing to determine the factual circumstances attending his arrest and the taking of his prints. The application was denied without a hearing [People v. Gates, 61 Misc. 2d 250 (Rockland Co. Ct. 1969)], with the County Court stating that:

> It was not until argument before the Court of Appeals on February 27, 1969, two years after defendant's conviction, that he, for the first time, raised the issue of the alleged violation of his Federal constitutional rights and which he now claims requires that his judgment of conviction be vacated.
>
> 61 Misc. 2d 250.

Again, as the panel of this Court correctly noted in its opinion (slip op. at 1351), the Rockland County Court's opinion never mentioned appellant's above-quoted objection, at trial, on constitutional grounds, to the "taking" of his prints (T. 535-536).

Appellant then appealed, from the trial court's denial of his coram nobis application, to the Appellate Division, Second Department, which stated that:

> Appellant never raised his Fourth Amendment claim in the trial court - either by motion to suppress or objection upon the trial to receipt of the evidence.
> ...He has forfeited that right by

failing to raise the constitional question in the trial court. . . .

People v. Gates, 36 App. Div. 2d 761 (2d Dept. 1971).

Once again, as the panel of this Court correctly observed in its opinion (slip op. at 1351), the Appellate Division's opinion never mentioned appellant's above-quoted objection, at trial, on constitutional grounds, to the "taking" of his prints:

> [B]oth [courts] assumed, without discussion, that no objection on the relevant ground had been made at trial.

Gates v. Henderson, supra, slip op. at 1351 (emphasis added).

The Appellate Division did correctly observe:

> However, in a footnote to its opinion, the Court of Appeals added that it was not then determining whether appellant would be entitled to a post-conviction hearing on the factual circumstances attending his arrest.

36 App. Div. 2d at 761

But the Appellate Division went on to rule that:

> The Court of Appeals having affirmed the conviction, instead of holding the appeal in abeyance pending remand to the trial court to develop a full record, appellant stands foreclosed from raising the issue again in a collateral proceeding.

(Id.)

Permission to appeal further to the New York Court of Appeals was denied in January, 1972.

Appellant then filed his pro se petition for a writ of habeas corpus with the United States District Court for the Southern District of New York. As the panel of this Court noted in its opinion, "The [district] court was perplexed about the lack of reference to the above-quoted objection in the three state courts opinions ... and by letter asked counsel for clarification" (slip op. at 1351):

> 1. Is it true, as the portions of the record quoted by Mr. Berman [T. 535-536] seem to show, that objection was made at trial to the admission of the evidence in question?
>
> 2. If such objection was made, how is it that three New York State courts' decisions were premised on the belief that such objection was not made?....
>
> 3. If objection was made at trial but not before, and the failure to object prior to trial is not excused..., is this case one of "deliberate bypass" of existing state remedies? (See, Fay v. Noia, 372 U.S. 391 (1963).*

2) The Opinion of the District Court

On May 27, 1976, the District Court dismissed the petition. In its opinion, the District Court held that although the New York Court of Appeals had stated that its reason for not reaching the merits of appellant's "fruits of an unlawful arrest" claim was that "it was not raised below at all" (emphasis added), the Court of Appeals' opinion

> ...is to be understood as holding that counsel's objection, quoted above [T. 535-536], was not sufficiently

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* Letter of Judge Robert L. Carter, to counsel, dated February 10, 1976.

> specific to raise the fruit of an unlawful arrest argument....
>
> 73 Cir. 3865 (S.D.N.Y. May 27, 1976), slip op. at 7, emphasis added.*

As to the third question it had posed in its letter of February 10, 1976, supra, [objection made at trial but not before; "deliberate bypass"], the District Court did not find that appellant's failure to object until the trial to be unexcused,** nor did it find this to be a case of "deliberate bypass."

The Opinion of the Panel of This Court

The panel held that the District Court's conclusion, that the state courts had deemed appellant's constitutional objection unsufficiently specific for state law purposes, "is doubtful" (slip op. at 1355), because none of those three state courts had ever even mentioned appellant's objection, and it was was "at least equally plausable" (id., at 1356) that those state courts were never aware of the objection.

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* The full text of the opinion of the District Court is reproduced in Appellant's Appendix.
Judge Carter's opinion was, of course, rendered some ten weeks before Stone v. Powell.

** The Court noted appellant's argument that the failure to object prior to, rather than during trial should be excused under the second exception of N.Y. former Code of Crim. Proc. §813-d because:

> "It was not until the commencement of trial that counsel learned that the police may not have had probable cause for the detention and printing of petitioner."
>
> S.D.N.Y. slip op., supra, at 7.

The panel also held that even if the District Court were correct as to what the state courts had found, such a state procedural default would not have amounted to a "deliberate bypass" of state procedures under Fay v. Noia, 372 U.S. 391 (1963), nor had the district made any such determination (slip op. at 1357).

Thus, the panel held that the failure of the state courts to permit appellant to develop the facts to support his claim* "deprived him of a state opportunity fully and fairly to litigate it ...[which] is a critical precondition to the application of Stone v. Powell" and that Stone, therefore, "does not operate here to prevent the district court from reaching the merits of appellant's Fourth Amendment claim" (slip op. at 1360).

ARGUMENT

THE DISTRICT COURT ERRED IN "UNDERSTANDING" THE STATE COURT OPINIONS AS HOLDING APPELLANT'S OBJECTION TO BE INSUFFICIENTLY SPECIFIC, BECAUSE THE RECORD SHOWS THAT THOSE STATE COURTS MISTAKENLY FOUND THAT APPELLANT HAD NEVER MADE ANY OBJECTION AT ALL. SINCE THE RECORD CONCLUSIVELY DEMONSTRATES THAT APPELLANT DID OBJECT, AND WITH SUFFICIENT SPECIFICTY, AND THAT APPELLANT DID NOT DELIBERATELY BYPASS STATE PROCEDURES, THE STATE COURTS MISTAKENLY DEPRIVED HIM OF AN OPPORTUNITY FOR FULL AND FAIR LITIGATION OF HIS FRUIT-OF-UNLAWFUL-ARREST CLAIM.

It is clear from an examination of New York State court opinions in appellant's case that all three state court decisions** were premised on the mistaken belief that no objection at all was

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* Which appellant had sought to do in the trial court (upon his constitutional objection to the "taking" of his prints); on his direct appeal; by way of his coram nobis application (which the Court of Appeals had anticipated and specifically not precluded); and again on appeal from the denial of a coram nobis hearing.

** See 24 N.Y. 2d 666; 61 Misc. 2d 250; 36 App. Div. 2d 761.

ever made at trial to the admission of the palmprint evidence. Appellant certainly did object at trial, on constitutional grcunds, to the "taking" of the prints (T. 535-536).* Nevertheless, as the panel of this Court observed:

> None of the three state opinions ever mentioned the objection cited by appellant here.... [I]t is at least equally plausable that the state courts were not aware of...appellant's objection.
>
> slip op. at 1355-56.

The District was understandably puzzled by this mistake in the state court decisions:

> [If, a]s the portions of the record quoted by Mr. Berman seem to show, that objection was made at trial to the admission of the evidence in question...how is it that three New York State courts' decisions were premised on the belief that such objection was not made?
>
> Judge Carter's letter of February 10, 1976, supra.

But the District Court erroniously resolved the above dilemma by reading into those three state court decisions an "understanding" which contradicts the plain language of those decisions, is inconsistant with the record, and defies common sense: The District Court decided that the state decisions' failure to mention appellant's objection really meant that those courts were saying that the objection had been insufficiently specific.**

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* We fail to see any difference between a "seizure" and a "taking."

** Judge Carter was correct in not holding that the objection at trial had been untimely.

And even if the state courts did believe that appellant's objection was not sufficiently specific, the objection was, for several reasons, certainly specific enough to preserve the issue for federal habeas corpus review:

(1) Appellant did not merely "object"; he specifically stated, on the record, that his objection was on constitutional grounds, both state and federal. Thus there was no possibility that any court might misconstrue that objection as having been a mere evidentiary one (eg. an objection to a leading question; an objection to repetitious or cumulative testimony; a claim of improper foundation; a lack of connection; an objection to a question calling for a conclusion; an objection to improperly prejudicial matter; an objection to hearsay).

(2) Not only did the objection specify "constitutional" grounds, but it also clearly specifically implied Fourth Amendment grounds, for appellant's objection was to the "taking" of the prints, and "taking" is synonymous with "seizure."

(3) Respondent's unfounded argument to the effect that perhaps appellent's objection was really on Fifth Amendment grounds is not only mere conjecture, but, as the panel correctly noted (slip op. at 1348, 1356), any arguable Fifth Amendment objection to fingerprints "had already been foreclosed," a year prior to appellant's trial, by the Supreme Court's decision in Schmerber v. California, 384 U.S. 757, 764 (1966).

(4) The objection was apparently sufficiently specific for the trial court, which, after verifying that the objection was, in the Courts' own words, "on constitutional

grounds to the mere fact of the taking of the prints," understood the objection sufficiently to rule on it.*

(5) The language of the New York Court of Appeals in People v. Friola, 11 N.Y. 2d 157 (1962), that merely "some effort in the[e] direction" of a Fourth Amendment objection is sufficient to preserve the question for appellate review, indicates that appellant's objection adequately preserved the issue.

(6) The language of the New York Court of Appeals in appellant's case indicates that the issue would be preserved unless there was a "failure...to intimate that such an issue was in the case." 24 N.Y. 2d at 670. Certainly, appellant's objection, which the Court of Appeals was apparently unaware of, was more than a mere intimation.

(7) Appellant's objection, on constitutional grounds, to the "taking," is reasonably specific for a pre-Davis v. Mississippi objection. Perhaps after April 22, 1969,** one might be required to object more specifically, but, quite frankly, appellant's objection at trial was, we submit, pretty good for 1967.

Appellant continuously, and with sufficient clarity, presented his constitutional claims in the state court proceedings, but to no avail. He therefore fully complied with the prerequisites necessary to be entitled to habeas corpus relief under 28 U.S.C. §2254(b). See Picard v. Connor, 404 U.S. 270, 276 (1971); United States ex rel. Nelson v. Zelker, 465 F.2d 1121 (2d Cir. 1972); United States ex rel. Gibbs v. Zelker, 496 F.2d 991 (2d Cir. 1973).

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* The trial court, in overruling the objection, did not rule that it was untimely.

** The date of the Supreme Court's decision in Davis.

* * *

Indeed, while it is clear that appellant did object at trial, and with sufficient specificity, even if the issue had been raised for the first time on direct appeal, that would have been sufficient to preserve the issue, since the New York Court of Appeals passed on the claim with sufficient finality.* Brown v. Allen, 344 U.S. 443, 447; 448-9 n.3 (1953); Picard v. Connor, 404 U.S. 270, 276 (1971); Braithwaite v. Manson, 527 F.2d 362, 366 (2d Cir. 1975), cert. granted, 96 S.Ct. 1737 (May 3, 1976).**

* * *

As we have demonstrated above, the District Court erronously interpreted the state court decisions to mean that those courts had found appellant's objection to be insufficiently specific to satisfy state procedures. But even if the District Court's creative interpretation of the state court decisions were correct, those decisions would not, as the District Court erronously believed, bar federal habeas corpus review, for appellant clearly

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* The Court of Appeals having affirmed the conviction, instead of holding the appeal in abequance pending remand to the trial court to develop a full record, appellant stands foreclosed from raising the issue again in a [state] collateral proceeding.

36 App. Div. 2d at 761.

** "See also United States ex rel. Vanderhorst v. LaVallee, 417 F.2d 411, 412 (2d Cir. 1969) (en banc) (citing New York authority for propositions that "'no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right'" and that "a constitutional issue may be raised for the first time on appeal in New York"), cert. denied, 397 U.S. 925 (1970). See also People v. Patterson, 39 N.Y. 2d 288, 347 N.E. 2d 898, 383 N.Y.S. 2d 573 (1976) (no objection necessary to preserve constitutional claim)."

Gates v. Henderson, supra, slip op. at 1356

had not "deliberately by-passed the orderly procedure of the state courts." Fay v. Noia, supra, 372 U.S. 391, 438 (1963).* This erroneous view might perhaps be correct in the case of a litigant seeking review by certiorari from a state court judgment, but it is clearly not the rule where the federal constitutional claim is posited in the federal courts in a §2254 habeas corpus proceeding. Fay v. Noia, supra, 372 U.S. at 436.

The decision of the Supreme Court in Fay, supra, clearly set forth the view that Supreme Court review by certiorari of a state court judgment is much more circumscribed than §2254 habeas corpus review by a federal district court. After stating that the Act of February 5, 1897, extended federal habeas corpus powers to its constitutional maximums for state prisoners, the Court stated:

> Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.
>
> Fay v. Noia, 372 U.S. at 426-427, (emphasis added).

The Court went on to analyze and reject as erroneous the arguments advanced against the proposition that, for purposes of habeas corpus review, procedural rules must yield.

> But while our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal

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* We respectfully refer this Court en banc to the panel's carefully reasoned discussion of Fay and "deliberate bypass" as they relate to appellant's case (slip op. at 1357-1360).

> courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter. The entire course of decisions in this Court elaborating the rule of exhaustion of state remedies is wholly incompatible with the propocition that a state court judgment is required to confer federal habeas jurisd jurisdiction. And the broad power of the federal courts under §2243 summarily to hear the application and to 'determine the facts, and dispose of the matter as law and justice require,' is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner. Re Medley, 134 US 160, 173, 33 L ed 835, 840, 10 S Ct. 384.
>
> Id., at 430-431, (emphasis of the Court).

Although the Court clearly recognized the need for the orderly administration of criminal justice and the need for the state to enforce their procedural rules upon defendants, it also realized that a person charged with a crime

> has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. Rogers v. Richmond, 365 US 534, 547, 548, 5 L ed 2d 750, 770, 81 S Ct 735. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits

> his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus embodied both in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution. For these several reasons we reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.
>
> Id. at 433-434

The Court, of course, was not unmindful of the need for compliance in the state courts, and it went on to hold that "deliberate bypass" of procedures of state courts could forfeit a petitoner's rights to federal habeas corpus review. But such a finding would have to satisfy the standards of waiver set forth in Johnson v. Zerbst, 304 U.S. 458 (1937), namely, "an intentional relinquishment or abandonment of a known right or privilege." Id. at 464,

In the instant case, no such finding was made by the District Court, nor could it have so found. Appellant's trial counsel made a constitutional objection to the "taking" of the palmprint and fingerprint evidence as best as he could, given the

rapidly-developing standards of Fourth Amendment law at the time of appellant's trial. Further, no "deliberate bypass" can be found herein, because the fingerprint/palmprint evidence, in the context of this purely circumstantial case, "pointed ineluctably to the defendant's guilt." People v. Gates, supra, 24 N.Y. 2d at 669. For appellant to have deliberately bypassed the issue, in the speculative hope that it could later be raised, would have been a decision bordering on incompetence, and, in any event, a state-court finding of waiver does not bind the federal courts. The absence or presence of a waiver of federal constitutional rights is always a question for federal courts. Fay v. Noia, supra, at 439.

> Given the vital importance of the fingerprint evidence to the State's case, it would have been senseless for appellant to have waived any available objection to the admission of the evidence. No trial tactic by anyone could conceivably involve omission to make such an objection. This court has recently held that failure to object at all to a charge to the jury did not constitute deliberate bypass, when the petitioner's trial strategy indicated that the lack of objection was inadvertent. Kibbe v. Henderson, 534 F.2d 493, 496-97 (2d Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3005 (U.S. July 1, 1976) (No. 75-1906).* It follows a fortiori that, when a lack of objection would have been virtually fatal to the petitioner's case, and when an objection was in fact made on constitutional grounds, the petitioner cannot be said, in the absence of clear evidence of a knowing waiver,

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* Although certiorari has been granted in Kibbe, supra, and although the case was argued before the Supreme Court on March 1, 1977 (20 Cr. L. 4186), the only issue upon which certiorari was granted in Kibbe, and the only issue which was briefed and argued in Kibbe in the Supreme Court, was whether the charge was so deficient as to violate due process. Thus, the Fay "deliberate bypass" standard, reaffirmed by this Court in Kibbe (534 F.2d at 496-97), and again reaffirmed by the panel of this Court in the instant case (slip op. at 1358), remains unchanged.

to have deliberately bypassed the state courts.*

Gates v. Henderson, supra, slip op. at 1357-58.

* * *

For the reasons which we have argued above and those which the panel cited in its carefully reasoned opinion, we believe that this Court en banc will agree that the "deliberate bypass" standard of Fay is still good law, and that since appellant's objection was at least sufficiently specific to preclude any finding of deliberate bypass, it was the state courts' mistaken

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* The State asserts in its brief that United States ex rel. Tarallo v. LaVallee, 433 F.2d 4 (2d Cir. 1970), cert. denied, 403 U.S. 919 (1971), is controlling here. We believe that case is distinguishable, however, because the petitioner there made no objection at all on constitutional grounds when the evidence allegedly seized illegally was originally introduced at trial, id. at 7, so that his later objection was untimely. Here there is no question that appellant seasonably objected "on constitutional grounds." It is specificity, not timeliness, that is at issue here.

Id., slip op. at 1358, n.8.

We also respectfully adopt the panel's well-reasoned discussion of Estelle v. Williams, 44 U.S.L.W. 4609 (May 3, 1976), and Francis v. Henderson, 44 U.S.L.W. 4620 (May 3, 1976), which appears at slip op. 1358-1360.

belief, that appellant never made any objection at all, which deprived him of the opportunity for a "full and fair litigation" in state court of his constitutional claim that the taking of his prints was the fruit of his unlawful arrest. Stone v. Powell, supra, 44 U.S.L.W. at 5321.*

That the panel's decision in the instant case should be adhered to by this Court en banc is all the more emphasized by the Fifth Circuit's very recent (February 11, 1977), very similar analysis of the Stone-Townsend-Fay question. O'Berry v. Wainwright, 546 F.2d 1204, 1210, 1211, 1213, 1215 (5th Cir. 1977).**

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* Again we respectfully refer this Court en banc to the panel's opinion, at 1352-55 and 1360.

** In O'Berry, supra, the Fifth Circuit ultimately denied the writ of habeas corpus, because there had been no contemporaneous objection at all, and because "there are no facts in dispute concerning this search." 546 F.2d at 1218. But the reasoning of the Fifth Circuit directly parallels that of the panel opinion of this Court [eg., "Where factual issues are in dispute, Townsend would provide a relatively clear formula for determining whether full and fair consideration of a fact issue has been afforded by the state courts." Id. at 1211], as well as the observation that the Supreme Court, in Stone, never defined "opportunity for full and fair consideration." 546 F.2d at 1210.

In Kahn v. Flood, ___ F.2d ___ (2d Cir. February 22, 1977), slip op. 1919, 1922, this Court held that a state trial court's granting of two full evidentiary suppression hearings satisfied the Stone standard of a "full and fair" hearing. Kahn is certainly consistant with the panel opinion in the instant case.

The panel's opinion should be confirmed by this Court en banc, the judgment below should be reversed, and the cause remanded for a hearing on the merits of appellant's claim.

CONCLUSION

THE PANEL'S OPINION SHOULD BE CONFIRMED, THE JUDGMENT BELOW SHOULD BE REVERSED AND THE MATTER REMANDED FOR A HEARING ON THE MERITS OF APPELLANT'S CLAIM.

Respectfully submitted,

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March, 1977

Counsel for appellant wishes to thank Steven Bernstein, Esq., and Abby Robinson for their indispensable assistance in the preparation of this brief.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF New York)

ABBY ROBINSON, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 34 White St, NY, NY 10013 On March 25, 1977, served the within Brief for Petitioner-Appellant on Rehearing en banc upon Louis J. Lefkowitz attorney(s) for Respondent-Appellee in this action, at 2 World Trade Center, NY, NY 10047 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - ~~post office~~ - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Abby Robinson
ABBY ROBINSON

Sworn to before me on
March 25, 1977.

Jane Remus